Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

NORFOLK DREDGING COMPANY,

Petitioner,

v.

JOHN L. WILEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Limitation of Liability Act ("Limitation Act") provides that, in the event of an accident on navigable waters, a shipowner's liability to claimants will be limited to the value of the vessel and its pending freight, provided that the loss was incurred without the owner's privity or knowledge. The shipowner must deposit with the court security which equals the value of the vessel and its pending freight. This sum constitutes the Limitation Fund. The district court then issues notice to all potential claimants requiring them to file their claims, and also issues an injunction preventing the prosecution in another forum of any claim arising from the accident against the shipowner. A district court may dissolve the injunction where only one claim is asserted against the shipowner, but only if the claimant files certain protective stipulations to preserve the shipowner's right to limit its liability to the Limitation Fund, and thus preserve the purpose of the Limitation Act.

The circuit courts are split on the following two questions, the resolution of which is necessary to ensure uniform application of the Limitation Act and to protect the rights of vessel owners under the Limitation Act.

1. Whether the Limitation Act requires a "single claimant" to stipulate to the specific value of the Limitation Fund before the district court determines whether to dissolve the limitation injunction and allow a single claimant to proceed with his case in state court.

2. Whether a limitation claimant's stipulations adequately protect a vessel owner's rights under the Limitation Act is a question of law reviewed *de novo*.

CORPORATE DISCLOSURE STATEMENT

Norfolk Dredging Company has no parents and it does not issue shares to the public.

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The opinion of the United States Court of Appeals for the Fourth Circuit is reported at *Norfolk Dredging Company v. Wiley*, 439 F.3d 205 (4th Cir. 2006). The Fourth Circuit's opinion affirmed the February 22, 2005 decision of the United States District Court for the Eastern District of Virginia, which is reported at 357 F. Supp. 2d 944 (E.D. Va. 2005). The order of the United States Court of Appeals for the Fourth Circuit denying Norfolk Dredging Company's petition for rehearing and rehearing *en banc* was not officially reported. *See* Appendices A-C.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 3, 2006. A timely petition for rehearing and rehearing *en banc* was denied on March 31, 2006. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth as follows:

46 U.S.C. app. § 183(a):

> The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such

owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. app. § 185:

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

28 U.S.C. § 1333(1):

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Portions of Rule F of the Supplemental Rules for Admiralty and Maritime Claims are also involved in this case and are set forth at Appendix D.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1333.

A. Limitation Pleadings and Stipulations

On or about November 27, 2003, Norfolk Dredging's workboat PUSHER #10 was operating near Sunny Point, North Carolina. John L. Wiley was injured while standing on the starboard side of the wheelhouse of the PUSHER #10.

On October 19, 2004, Norfolk Dredging timely filed its complaint for exoneration from, or limitation of, liability under the Limitation of Liability Act, 46 U.S.C. app. §§ 181 *et seq.*, ("Limitation Act") and pursuant to Supplemental Rule F of the Federal Rules of Civil Procedure. Norfolk Dredging sought exoneration from, or limitation of, liability for damages resulting from Wiley's November 27, 2003 injury, and sought to limit its liability to the value of the PUSHER #10.

On October 20, 2004, the District Court entered an Order accepting Norfolk Dredging's *Ad Interim* Stipulation of the value of the PUSHER #10 in the amount of eighty thousand dollars ($80,000.00), with interest at 6% per annum from the date of filing. This was the Limitation Fund. The District Court also issued an Injunction and Notice Order that same date enjoining the commencement or prosecution of any actions or suits of any nature against Norfolk Dredging or PUSHER #10, and commanding that all persons claiming damages arising out of the operation of the PUSHER #10 on November 27, 2003 were to file claims on or before November 23, 2004.

On November 23, 2004, Wiley filed a claim in the amount of one million two hundred fifty thousand dollars ($1,250,000.00). On the same day, Wiley also filed, *inter alia*, a Motion to Dissolve the Injunction and Stay the Proceeding and a Motion to Increase the Limitation Fund and Increase Security. Wiley's Motion to Increase the Limitation Fund argued that, pursuant to the so-called "flotilla doctrine," the limitation fund should include three other vessels (a dredge, a barge, and a tugboat) allegedly involved in the dredging operation during which he was injured.

In support of his Motion to Dissolve the Injunction and Stay the Proceeding, Wiley filed the following stipulations: (1) that the Federal District Court has exclusive jurisdiction to decide all Limitation of Liability issues; (2) that the value of the vessel PUSHER #10 is not disputed, but that the Limitation Fund should include all vessels contractually engaged in a common enterprise under a single command at the time of Wiley's injuries; (3) that this is a single claim; and (4) that there will be no *res judicata* arguments made

based upon any jury trial decision or judgment in state court or federal court. In his Rebuttal Brief, Wiley further stipulated that he will not seek to enforce any judgment received from a jury in excess of the Limitation Fund until Norfolk Dredging's right to limitation has been determined in admiralty. In other words, Wiley did not stipulate to a sum certain value of the Limitation Fund; he disputed both the amount of the Limitation Fund and what vessels should constitute the Limitation Fund.

B. The Decisions Below

Following a hearing on February 1, 2005, the district court issued an Opinion and Order on February 22, 2005 which, *inter alia*, granted Wiley's Motion to Dissolve the Injunction and Stay the Proceeding. By dissolving the injunction, the district court authorized Wiley to pursue his action outside of the limitation proceeding in state court before a jury, but without stipulating to the value of the Limitation Fund. The district court's opinion and order denied Wiley's Motion to Increase the Limitation Fund and Increase Security, stating that "[b]ecause this issue may be rendered moot if claimant's judgment in state court does not exceed the limitation fund as it now stands, claimant agreed at the hearing to set this issue aside until such time as it becomes relevant." (Appx. B at 29a). However, the district court permitted Wiley to renew the motion in the limitation action if necessary. (Appx. B at 29a). As such, the questions of (1) what vessel or vessels constitute the Limitation Fund and (2) what is the value of said vessels, and hence the Limitation Fund itself, are still in dispute as Wiley proceeds to state court.

On March 23, 2005, pursuant to 28 U.S.C. § 1292, Norfolk Dredging timely filed its Notice of Appeal of the district court's February 22, 2005 Order. In a March 3, 2006 Opinion, a panel from the Fourth Circuit made up of Judges Niemeyer, Luttig, and Traxler affirmed the district court's February 22, 2005 Order. (Appx. A). The panel denied a timely petition for rehearing and rehearing *en banc* on March 31, 2006. (Appx. C).

REASONS FOR GRANTING THE PETITION

The circuit courts are split regarding whether a single claimant must stipulate to the specific value of the Limitation Fund as a prerequisite to getting the limitation injunction dissolved. The Second, Fifth, Eighth, Ninth, and Eleventh Circuits require single claimants to stipulate to the specific value of the Limitation Fund before the district court may dissolve the limitation injunction. The Fourth, Sixth, and Seventh Circuits do not require such a sum certain stipulation before permitting the injunction to be dissolved. The Fourth Circuit's opinion below contravenes not only this Court's decision in *Ex Parte Green*, 286 U.S. 437 (1932) but also more than 150 years of Congressional intent to protect shipowners from unlimited liability. Review is necessary to resolve an important dispute between the circuit courts concerning what stipulations a limitation claimant must proffer before a limitation injunction can be dissolved.

The circuit courts are also split as to whether the adequacy of the claimant's stipulations to protect a vessel owner's rights under the Limitation Act is a question of law reviewed de novo or simply for abuse of discretion. In the Fifth Circuit, the issue is a question of law reviewed de novo; in the Fourth Circuit, the issue is reviewed for abuse of

discretion. Review by this Court is required to ensure the uniform application of the correct standard of review of the stipulations a claimant must make before a limitation injunction can be dissolved.

If the decision of the Fourth Circuit is allowed to stand, it will further erode the rights of vessel owners to cap their liability under the Limitation Act. It will also foster uncertainty in an area of the law which needs uniform standards established by this Court.

A. Purpose and Procedure of the Limitation Act

The global purpose of the Limitation Act was "to encourage ship-building and to induce capitalists to invest money in this branch of industry [by] exempting innocent shipowners from liability, beyond the amount of their investment." *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871); *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957) (Limitation Act intended "to encourage the development of American merchant shipping"). Thus, protecting vessel owners was paramount.

Rule F of the Supplemental Admiralty and Maritime Claims sets forth the process for filing a complaint seeking exoneration from, or limitation of, liability. "The district court secures the value of the vessel or owner's interest, marshals claims, and enjoins the prosecution of other actions with respect to the claims." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 448 (2001). Parties who thus have claims against the vessel's owner are required to pursue those claims in the limitation proceeding. *See* Supplemental Rule F(5). "[T]he court, sitting without a jury, adjudicates the claims. The court determines whether the vessel owner is liable and

whether the owner may limit liability. The court then determines the validity of the claims, and if liability is limited, distributes the limited fund among the claimants." *Lewis*, 531 U.S. at 448.

While this aspect of the Limitation Act focuses on the equitable apportionment of limited funds, it operates from the predicate that the funds are limited. Therefore, the injunction must remain in effect to protect the shipowner. The statute contains no exception to the mandatory injunction against other litigation. *See* 46 U.S.C. app. § 185.

B. "Adequate Fund" and "Single Claimant" Exceptions

As this Court stated in *Lewis*, "[s]ome tension exists between the saving to suitors clause [28 U.S.C. § 1333(1)] and the Limitation Act. One statute gives suitors the right to a choice of remedies, and the other statute gives vessel owners the right to seek limitation of liability in federal court." *Id.* In recognition of this tension, this Court has established two judicially-created exceptions in which a claimant may be allowed to pursue an action in another forum and have the claim tried before a jury. At the same time, however, the federal court retains jurisdiction over all matters affecting the shipowner's right to limit its liability.

1. "Adequate Fund"

Under the "adequate fund" exception, a district court is obliged to dissolve the injunction against all other legal proceedings where the value of the limitation fund exceeds the total value of all the claims asserted against the shipowner. *Lake Tankers*, 354 U.S. at 152 ("Where the value of the vessel and the pending freight exceed the claims . . . there is no

necessity for the maintenance of the action in federal court"). In such a case, the vessel owner is not exposed to liability in excess of the limitation fund, and thus the vessel owner's rights under the Limitation Act are not implicated.

2. "Single Claimant"

Under the "single claimant" exception, which is the exception at issue here, a district court may dissolve the injunction where only one claim is asserted against the shipowner. *Langnes v. Green*, 282 U.S. 531, 540-42 (1931) (*Green I*); *Ex Parte Green*, 286 U.S. 437, 438-40 (1932) (*Green II*). However, the injunction will not be lifted unless the claimant files certain protective stipulations to preserve the shipowner's right to limit its liability to the Limitation Fund, and thus preserve the purpose of the Limitation Act. It is the content of these stipulations on which the circuit courts are split.

C. The Circuits are Split Regarding Whether a Single Claimant must Stipulate to the Specific Value of the Limitation Fund prior to Dissolution of the Limitation Injunction.

1. The Eighth, Ninth, Fifth, Eleventh, and Second Circuits require single claimants to stipulate to the specific value of the Limitation Fund before the district court may dissolve the limitation injunction.

The Eighth and Ninth Circuits expressly require that, as a condition precedent to dissolution of the limitation injunction, a single claimant must, *inter alia*, concede that the value of the fund is the value of the vessel and its freight. *See, e.g., Riverway Harbor Service v. Bridge & Crane Inspection, Inc.*, 263 F.3d 786, 792 (8th Cir. 2001); *Newton*

v. Shipman, 718 F.2d 959, 962 (9th Cir. 1983); *Ross Island Sand & Gravel v. Matson*, 226 F.3d 1015, 1017-18 (9th Cir. 2000); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 418 n.6 (8th Cir. 1979); *Helena Marine Service, Inc. v. Sioux City & New Orleans Barge Lines, Inc.*, 564 F.2d 15, 17 n.2, 18 (8th Cir. 1977), *cert. denied*, 435 U.S. 1006 (1978); *Valley Line Co. v. Ryan*, 771 F.2d 366, 373 (8th Cir. 1985).

The Fifth Circuit's recent decision in *In re Tetra Applied Technologies*, 362 F.3d 338 (5th Cir. 2004) is to the same effect. The vessel owner in *Tetra* had filed a stipulation of value in the district court that the vessel was worth $725,000. The claimant then stipulated that, *inter alia*, he "would not 'seek to enforce any excess judgment or recovery insofar as it may expose [Tetra] to liability in excess of $725,000 pending the adjudication of the complaint of limitation of liability.'" *Id.* at 339. The Fifth Circuit explained that "[t]his stipulation accomplishes the same purpose as stipulating to the adequacy of the fund; *it protects the shipowner's right to cap his liability at the amount of the fund, pending the limitation proceeding*. *Id.* at 343 (emphasis added). Thus, a claimant's stipulation that he would not seek to enforce a judgment in excess of the sum certain Limitation Fund was equivalent to stipulating that the limitation fund accurately reflected and equaled the value of the vessel or vessels involved. This stipulation effected the goal of the Limitation Act: to limit a claimant's ultimate recovery "to the total value of the fund." *Id.*

The Eleventh and Second Circuits have similarly held. *See Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1035, 1044 (11th Cir. 1996), *cert. denied*, 520 U.S. 1275 (1997) (claimants stipulated that they would not seek to enforce a judgment in excess of the $40,900.00 stipulated by vessel

owner as value of offending vessel and court reaffirmed necessity of such a stipulation); *Dammers & Vanderheide & Scheepvaart Maats Christina v. Corona*, 836 F.2d 750, 754, 759 (2nd Cir. 1988) (court approved stipulation that claimants would not seek to enforce a judgment in excess of the $7,671,000.00 in the Limitation Fund).

These decisions from the Eighth, Ninth, Fifth, Second, and Eleventh Circuits are in accord with this Court's precedent which requires certainty of the limitation fund prior to dissolution of the injunction in a single claimant case. In *Green I*, this Court permitted a sole claimant to proceed in his pending state court action where the parties stipulated to the value of the vessel in question. 282 U.S. at 532, 542.[1] The purpose of this requisite stipulation was explained as follows: "All that the petitioner can fairly claim is that *he should not be subject to a personal judgment for an indefinite amount and beyond the value of his interest in the Lotta and her freight*." *Id.* at 541 (internal citation omitted) (emphasis added).

After the claimant in *Green I* attempted to litigate the limitation issue in state court, this Court was prompted to issue a second opinion, stating that the "state court has no jurisdiction to determine the question of the owner's right to a limited liability, *and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case*." *Green II*, 286 U.S. at 439-40 (emphasis added). Thus, the limitation injunction should not be lifted if a single claimant fails to stipulate as to a sum certain for the vessel and that said sum constitutes the limitation fund.

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1. The vessel owner in *Green I* had failed to file its limitation action until just two days before trial commenced in state court. The six-month limit for filing a limitation complaint was enacted after *Green I* was decided. *See* Advisory Committee Notes to Supplemental Rule F.

This principle was recently discussed in *Lewis v. Lewis & Clark Marine, Inc.* While the claimant in *Lewis* filed the requisite stipulations under the adequate fund exception, this Court set forth two examples where the vessel owner's rights will not be protected under the Limitation Act and made clear that it is proper for the district court to deny a motion to dissolve the injunction:

> If the district court concludes that the vessel owner's right to limitation will not be adequately protected – where for example a group of claimants cannot agree on appropriate stipulations *or there is uncertainty concerning the adequacy of the fund* or the number of claims – the court may proceed to adjudicate the merits, deciding the issues of liability and limitation.

531 U.S. at 454 (emphasis added). A vessel owner's right to limitation cannot be subordinated to a single claimant's rights under the "saving to suitors" clause unless the claimant files the required stipulations. *Id.* at 451-52, 454; *see also Green II*, 286 U.S. at 438-40. So long as the value of the limitation fund is in question, the stipulations are inadequate as a matter of law under *Green II* and *Lewis*. Where the stipulations are inadequate, the district court does not possess discretion to dissolve the limitation injunction. However, there is a conflict among the circuits on this issue.

2. The Fourth, Sixth, and Seventh Circuits do not require single claimants to stipulate to the specific value of the Limitation Fund before the district court may dissolve the limitation injunction.

The Sixth and Seventh Circuits – and now the Fourth Circuit in the opinion below – do not require single claimants to stipulate to the specific value of the Limitation Fund prior to dissolution of the limitation injunction. In *Midland Enterprises, Inc. v. Brasher*, 886 F.2d 812 (6th Cir. 1989), the Sixth Circuit held that the limitation injunction may be lifted if the claimant, *inter alia*, merely moved pursuant to Rule F(7) to challenge the value placed on the offending vessel and conceded the district court's right to determine the value of the vessel. *Id.* at 817-18. Notably, the Sixth Circuit did not require the district court to adjudicate the Rule F(7) motion and determine the sum certain value of the Limitation Fund prior to dissolving the injunction. *Id.* at 818. Specifically, the court stated that "[a]lthough we think it would be of value to both parties to know as soon as possible just what the monetary limit of liability will be, we leave the scheduling details to the good judgment of the district judge." *Id.*

In *Complaint of McCarthy Brothers Company/Clark Bridge*, 83 F.3d 821 (7th Cir.), *cert. denied*, 519 U.S. 950 (1996), the Seventh Circuit relied upon the Sixth Circuit's opinion in *Midland Enterprises*, *supra*, and held that that "[w]e agree with the Sixth Circuit that the claimant need only stipulate to the district court's authority to determine the value of the limitation fund. . . ." *Id.* at 832. *See also id.* ("the Sixth Circuit has noted that it is no longer necessary for a claimant to expressly stipulate to the value of the limitation fund").

In short, the Fourth, Sixth, and Seventh Circuits permit dissolution of the limitation injunction without establishment of a sum certain Limitation Fund. Given the circuit courts' conflicting views on this question of whether the Limitation Act entitles a vessel owner to a sum certain Limitation Fund prior to dissolution of the limitation injunction, it is critical that this Court provide further guidance to the federal courts.

D. The Circuits are Split regarding whether a Limitation Claimant's Stipulations Adequately Protect a Vessel Owner's Rights under the Limitation Act is a Question of Law reviewed de novo.

The Fourth Circuit panel reviewed the district court's decision to dissolve the limitation injunction under an abuse of discretion standard. (Appx. A at 7a). However, the district court made its decision to dissolve the limitation injunction by first determining that Wiley's stipulations were adequate to protect Norfolk Dredging's rights under the Limitation Act. (Appx. B at 26a-28a). The Fourth Circuit also decided this issue, and did so under an erroneous standard of review which is in conflict with the only other circuit court to have decided this issue.

As the Fifth Circuit explained in *In re Tetra Applied Technologies*:

> This court reviews a district court's decision to lift a stay for abuse of discretion. *See In re In the Matter of Tidewater Inc.*, 249 F.3d 342, 345 (5th Cir. 2001). *At the same time, however, the issue of whether a set of stipulations adequately protects a shipowner's rights under the Limitation Act is a question of law reviewed de novo. Id.*

362 F.3d at 340 (emphasis added).

The genesis of the Fourth Circuit's application of the wrong standard of review can be traced to a misreading of *Lewis, supra*, in which this Court observed that "the question presented is whether the District Court abused its discretion in dissolving the injunction." 531 U.S. at 440. However, before the district court may exercise any discretion to dissolve a limitation injunction in a single-claimant case, the stipulations filed by the claimant must be adequate as a matter of law under the Limitation Act.

This Court's review of this conflict between the Fourth and Fifth Circuits is essential to ensure the application of the correct standard of review of the stipulations the claimant must make to ensure the protection of vessel owners' rights under the Limitation Act.

E. The Fourth Circuit's Opinion Contravenes the Fundamental Purpose of the Limitation Act.

The fundamental purpose of the Limitation Act is to place a sum-certain cap on a vessel owner's liability arising out of a maritime casualty. See 46 U.S.C. § 183 ("The liability of the owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending"); see also 46 U.S.C. § 185 ("The vessel owner . . . shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight. . . ."). This core purpose of the Limitation Act was acknowledged by the Fourth Circuit in the opinion below: "'The policy underlying liability limitation was to induce the heavy financial commitments the shipping industry requires *by mitigating the threat of a multitude of suits and the hazards of vast, unlimited liability as a result of a maritime disaster.*'" Appx. A at 8a (quoting

Maryland Cas. Co. v. Cusing, 347 U.S. 409, 414 (1954)) (emphasis added).

Consistent with this purpose, Supplemental Rule F(1) requires the vessel owner to: "deposit with the court for the benefit of claimants, *a sum equal to the amount or value of the owner's interest in the vessel and pending freight*, or approved security therefore. . . ." (Emphasis added). It was with this fundamental right of the vessel owner in mind that this Court stated in *Lewis* that:

> we believe that the District Court properly exercised its discretion in dissolving the injunction. . . . The court dissolved the injunction against the state court proceedings after it concluded that respondent's rights would be adequately protected. *Respondent's rights were protected by petitioner's stipulation that his claim did not exceed the limitation fund* . . . .

531 U.S. at 451-52 (emphasis added).

It is axiomatic that the failure to protect the rights of the vessel owner (by dispensing with the required stipulation of value) prejudices those rights. Against the obvious failure of Wiley's stipulations to protect Norfolk Dredging's limitation right to a sum-certain cap, there is no basis for the Fourth Circuit's conclusion that it "cannot see how saving for another day the question of Norfolk Dredging's amount of liability prejudiced its general right to limit liability." (Appx. A at 11a). The Fourth Circuit's opinion permits this case to now proceed to state court without ever establishing the sum-certain cap mandated by Congress, this Court, and Supplemental Rule F.

While the cap ought to be $80,000, should the so-called "flotilla doctrine" be applied, it might be vastly more. In the present state of the record, the true amount of the Limitation Fund is unknown. By leaving the amount of the fund undecided, the vessel owner is subject to "the hazards of vast, unlimited liability as a result of a maritime disaster." *Maryland Cas. Co. v. Cusing*, 347 U.S. at 414.

Thus, if the Fourth Circuit's opinion, and the Sixth and Seventh Circuit's opinions discussed above, are not brought into alignment with the majority of circuits, future claimants will be able to obtain dissolution of limitation injunctions without ever stipulating to a sum-certain limit of the vessel owner's liability, thereby eroding more than a century and half of Congressional intent to protect shipowners from unlimited liability.

Finally, the Fourth Circuit ruled that "postponing a decision on the final amount of the limitation fund was the precise procedure approved in *Two "R" Drilling Co. v. Rogers*, 943 F.2d 576 (5th Cir. 1991)." App. A at 12a. This is incorrect. The amount of the limitation fund was stipulated to by the claimant in *Two "R" Drilling Co.*, just as it had been in *Lewis*. The vessel owner in *Two "R" Drilling* had filed a stipulation in the district court that the value of the offending vessels totaled $460,887.06. In response, the claimants stipulated that "in no event [would they] seek to enforce that excess judgment or recovery insofar as same may expose Two "R" Drilling Company, Inc., to liability in excess of $460,887.06 pending the adjudication of the complaint of limitation of liability in this Court." 943 F.2d at 578. This is virtually identical to the stipulation approved in *In re Tetra, supra*.

Unlike the claimants in *Two "R" Drilling* or *In re Tetra*, Wiley merely stipulated that he "will not seek to enforce any judgment received from a jury in excess of the *Limitation Fund* until the vessel owner's right to limitation has been determined in admiralty." (Appx. B at 28a) (emphasis added). *See also* Appx. A at 11a. Wiley never promised that he would not enforce a judgment in excess of the $80,000 value of the PUSHER #10, as the Fourth Circuit erroneously believed. Instead, he only stipulated that he would not enforce a judgment in excess of the Limitation Fund; a fund which he not only rejects, but which he contends should include three more vessels (whose values are not in evidence), pursuant to the so-called "flotilla doctrine." (Appx. A at 11a; Appx. B at 28a).

Because Wiley failed to stipulate to the $80,000 value of the limitation fund and refuses to agree that he will not enforce a judgment in excess of $80,000, Norfolk Dredging's rights under the Limitation Act have been prejudiced.

CONCLUSION

The Fourth Circuit's opinion below further widens the split between the circuits on the question of whether the Limitation Act entitles a vessel owner to a sum certain Limitation Fund prior to dissolution of the injunction mandated by the Act. The Fourth Circuit's opinion also created a conflict between the Fourth and Fifth Circuits regarding the standard of review by which a claimant's stipulations must be judged. This Court's review is essential to resolve these circuit splits, clarify what stipulations a single claimant must make to ensure the protection of vessel owners' rights under the Limitation Act, and pronounce the correct standard of review by which to judge the stipulations.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 3, 2006

UNITED STATES COURT OF APPEALS FOURTH CIRCUIT

No. 05-1331

NORFOLK DREDGING COMPANY,

Plaintiff-Appellant,

v.

John L. WILEY,

Claimant-Appellee.

Argued: Nov. 29, 2005
Decided: March 3, 2006

Before NIEMEYER, LUTTIG, and TRAXLER, Circuit Judges.

Affirmed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge LUTTIG and Judge TRAXLER joined.

OPINION

NIEMEYER, Circuit Judge:

After John Wiley, a seaman, was injured aboard the tug *Pusher # 10*-a heavy line snapped and struck his face-the tug's owner, Norfolk Dredging Company, commenced this

action in admiralty to limit its liability to the value of the tug, in accordance with the Limitation of Liability Act, 42 U.S.C. app. § 181, *et seq.*, and Supplemental Admiralty and Maritime Claims Rule F. The district court approved the value of the tug tendered by Norfolk Dredging and enjoined all other actions against Norfolk Dredging or the *Pusher # 10* arising from the incident, requiring claimants to file their claims in this action.

Wiley, the only person injured in the accident, filed a claim exceeding the tug's value, together with a motion to dissolve the injunction and stay this action to permit him to pursue his Jones Act claim and related admiralty claims in state court. In support of his motion, Wiley stipulated to exclusive federal jurisdiction over all Limitation of Liability matters, to the value of the *Pusher # 10*, and to Norfolk Dredging's right to limit liability. He also committed that he would not undercut Norfolk Dredging's Limitation of Liability right by asserting *res judicata* arguments based on any state judgment that he might obtain. Wiley did not, however, agree that the value of the *Pusher # 10* alone was the maximum limit of Norfolk Dredging's liability; he alleged that pursuant to the "flotilla doctrine," the maximum limit of Norfolk Dredging's liability also included the value of three other vessels involved in the dredging operations when he was injured. Accordingly, Wiley filed a motion to increase the "limitation fund" to the value of all four vessels involved in the dredging operation.

Resolving the tension between Wiley's right to bring a Jones Act claim in state court and Norfolk Dredging's right to have its liability limited by a federal court under the

Limitation of Liability Act, the district court entered an order dated February 22, 2005, dissolving the injunction and staying this action in accordance with the principles stated in *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001). The court found that Wiley's stipulations adequately protected Norfolk Dredging's right to limit its liability. The court temporarily denied Wiley's motion to increase the limitation fund through the application of the flotilla doctrine, reasoning that Wiley's flotilla doctrine argument would become moot if a state jury awarded Wiley less than the value of the *Pusher # 10*. The court permitted Wiley "to renew [his motion] in the limitation action, if necessary."

From the district court's interlocutory order dissolving its earlier injunction, Norfolk Dredging filed this appeal, contending that Wiley's stipulations do not adequately protect its federal right to limit its liability and that, in any event, Wiley waived his right to move the district court to dissolve the injunction by filing motions for affirmative relief and by pursuing discovery in this action.

For the reasons that follow, we conclude that the district court did not abuse its discretion in dissolving the injunction and therefore affirm.

I

On November 27, 2003, Norfolk Dredging was dredging a docking basin at an ammunition depot in the port of Sunny Point, North Carolina, using four vessels that it owned-the tug *Pusher # 10*, the tug *Norfolk*, the hydraulic dredge

Charleston, and the anchor barge *Diadapper # 2*. Wiley, a crew member on the *Charleston*, was serving as a deckhand on the *Pusher # 10* when a two-inch line parted and struck him in the face, seriously injuring him. No one else was injured in the incident.

Norfolk Dredging commenced this action on October 19, 2004, to limit its liability to the value of the *Pusher # 10*, pursuant to the Limitation of Liability Act, 46 U.S.C. app. § 181 *et seq.* Norfolk Dredging claimed that the value of the *Pusher # 10*, a 39-foot steel-hulled tugboat, was no greater than $80,000 and tendered that amount as a limitation fund. By order dated October 20, 2004, the district court approved Norfolk Dredging's proffered value and entered an injunction enjoining all suits against Norfolk Dredging or the *Pusher # 10* and directing all persons with claims arising out of the November 27, 2003 incident to file them in this action.

Wiley filed a claim in this action seeking $1.25 million as damages. He also filed a motion to increase the limitation fund, asserting that pursuant to the flotilla doctrine, Norfolk Dredging's limit of liability should be no less than the value of all four vessels involved in the dredging operation on November 27, 2003. He alleged that all four vessels were working together; all were owned by Norfolk Dredging; and all were contractually engaged in a common enterprise under a single command.*

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* The flotilla doctrine is described in *Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 329-30, 47 S.Ct. 368, 71 L.Ed. 663 (1927), which held that "any vessel transporting merchandise or property," as that phrase is used in the Harter Act, included both the tug and

(Cont'd)

Wiley also filed a motion to dissolve the injunction and stay the federal proceeding to allow him to pursue his claim under the Jones Act before a jury in state court. To support his motion, Wiley stipulated (1) that the district court had exclusive jurisdiction to decide all Limitation of Liability issues; (2) that the value of the *Pusher # 10* was $80,000, reserving his contention that the limitation fund should also include the value of the other three vessels pursuant to the flotilla doctrine; and (3) that he was the only claimant with respect to the November 27, 2003 incident. He also assured the court that he would not make any *res judicata* argument based on a judgment in state court that he might obtain and that he would not seek to enforce any such judgment in excess of the limitation fund as determined by the district court.

The district court concluded that Wiley's stipulations and undertakings would adequately protect Norfolk Dredging's Limitation of Liability right and accordingly granted Wiley's motion to dissolve the injunction, staying the federal proceeding to permit Wiley to pursue his Jones Act claim in a separate action before a jury in either state or federal court. The court denied Wiley's motion to increase the limitation

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(Cont'd)

barge in dispute because both were "indispensable" to carrying out the maritime contract to transport goods and therefore were "in law, one vessel," and *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn Eastern District Terminal*, 251 U.S. 48, 52, 40 S.Ct. 66, 64 L.Ed. 130 (1919), which rejected the flotilla doctrine in a Limitation of Liability action where a barge and a disabled tug were lashed to the sides of an actively powered tug because only the powered tug was "actively responsible" for the collision, even though the barge was the vessel that collided with the claimant.

fund under the flotilla doctrine because the motion "may be rendered moot if the claimant's judgment in state court does not exceed the Limitation Fund as it now stands." The court agreed, however, to reconsider the flotilla doctrine argument if Wiley's Jones Act judgment were to exceed $80,000 and Wiley again filed the motion to increase the fund.

From the district court's order of February 22, 2005, dissolving its October 20, 2004 injunction and staying this action, Norfolk Dredging filed this interlocutory appeal. *See* 28 U.S.C. § 1292(a)(1).

II

Norfolk Dredging contends that the district court's February 22, 2005 order dissolving its earlier injunction "contravenes the fundamental purpose of the Limitation Act to protect shipowners' rights to limited liability." Because Wiley never stipulated to the value of the limitation fund and therefore failed "to file *all* of the required stipulations" (emphasis added), Norfolk Dredging argues that its right to limited liability is left unprotected. Although Wiley did agree that the *Pusher # 10* was properly valued at $80,000, he nonetheless contended that the fund should also include the value of Norfolk Dredging's three other vessels engaged in the dredging operation at the time he was injured. Norfolk Dredging asserts that the district court abused its discretion in deferring its ruling on the limitation fund and staying this action and that we should reverse the district court's order and direct the court "to adjudicate the issues of liability and limitation."

Wiley contends that the district court does not, under the principles of *Lewis*, have to decide the limitation fund's value as a condition of exercising its discretion to dissolve the injunction. He argues:

> If it is necessary to come back to the limitation court to decide limitation of liability and the true amount of the limitation fund, including the flotilla doctrine, the Federal District Court can be relied on to make appropriate findings and decisions. . . .

Thus, the issue presented is whether the district court's order permitting Wiley to pursue his Jones Act claim in a separate action improperly denied Norfolk Dredging its Limitation of Liability right, particularly when the district court postponed making a determination of the amount of the limitation fund. We review for abuse of discretion. *See Lewis*, 531 U.S. at 440, 121 S.Ct. 993.

The Jones Act gives Wiley the right to redress his personal injury in state or federal court, before a jury or not, as he elects. *See* 46 U.S.C. app. § 688. Consistent with this array of choices available to a Jones Act claimant, the admiralty jurisdiction of federal courts is limited so as to save to seamen their remedies. Section 1333 of Title 28 provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) any civil case of admiralty or maritime jurisdiction,

> *saving to suitors in all cases all other remedies to which they are otherwise entitled.*

28 U.S.C. § 1333(1) (emphasis added).

At the same time, the Limitation of Liability Act gives a shipowner the right to limit its liability through a proceeding in federal court in admiralty. *See* 46 U.S.C. app. § 181 *et seq.*; Supplemental Admiralty and Maritime Claims Rule F. The Act provides that a shipowner's liability for claims such as Wiley's shall not "exceed the amount or value of the interest of such owner in such vessel, and her freight then pending," so long as injuries arose "without the privity or knowledge of such owner." 46 U.S.C. app. § 183(a). Congress passed the Limitation of Liability Act "to assist shipowners by placing them in parity with European (and particularly English) shipowners who had long enjoyed the benefits of limiting their liability for marine disasters." *Pickle v. Char Lee Seafood, Inc.*, 174 F.3d 444, 448 (4th Cir.1999). The policy underlying liability limitation was "to induce the heavy financial commitments the shipping industry requires by mitigating the threat of a multitude of suits and the hazards of vast, unlimited liability as a result of a maritime disaster." *Maryland Cas. Co. v. Cushing*, 347 U.S. 409, 414, 74 S.Ct. 608, 98 L.Ed. 806 (1954).

Recognizing the tension between the injured seaman's right to trial in a state or federal court before a jury, or not, for his Jones Act claim and related admiralty claims and the right of a shipowner to limit its liability in federal court to the value of the vessel, the Supreme Court has approved a procedure that permits the seaman to pursue his suit and,

at the same time, permits the shipowner to limit its liability on that claim to the value of the ship. *See Lewis*, 531 U.S. 438, 121 S.Ct. 993, 148 L.Ed.2d 931; *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 77 S.Ct. 1269, 1 L.Ed.2d 1246 (1957); *Ex parte Green*, 286 U.S. 437, 52 S.Ct. 602, 76 L.Ed. 1212 (1932); *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931).

In *Lewis*, the Supreme Court's most recent visit to this issue, the seaman, who tripped over a wire on a ship and hurt his back, sued the shipowner in state court for negligence under the Jones Act, unseaworthiness of the ship, and maintenance and cure. The shipowner filed a separate complaint in federal court under the Limitation of Liability Act to limit the seaman's claim to the value of the ship. The district court approved the shipowner's proposed value and enjoined the filing or prosecution of any other claims. After the seaman stipulated to facts and undertakings that would, in the end, limit his liability to the value of the vessel, the district court dissolved its injunction and permitted the seaman to pursue his state court action. In affirming the district court's decision to dissolve the injunction, the Supreme Court stated:

> [W]e believe that the District Court properly exercised its discretion in dissolving the injunction that prevented petitioner from pursuing his claims in state court. The District Court, guided by our prior cases, attempted to reconcile petitioner's right to his remedy under the saving to suitors clause with respondent's right to seek limited liability under the Limitation Act.

> The court dissolved the injunction against the state court proceedings after it concluded that respondent's right to seek limitation of liability would be adequately protected. Respondent's rights were protected by petitioner's stipulation that his claim did not exceed the limitation fund, petitioner's waiver of any defense of res judicata with respect to limitation of liability, and the District Court's decision to stay the Limitation Act proceedings pending state court proceedings.

Lewis, 531 U.S. at 451-52, 121 S.Ct. 993. Emphasizing its holding that the seaman's personal injury action should be permitted to go forward so long as the shipowner's Limitation of Liability right was protected, the Supreme Court stated,

> In sum, this Court's case law makes clear that state courts, with all their remedies, may adjudicate claims like petitioner's against vessel owners *so long as the vessel owner's right to seek limitation of liability is protected.* Respondent seeks to invert that rule, making run of the mill personal injury actions involving vessels a matter of exclusive federal jurisdiction except where the claimant happens to seek a jury trial. We reject that proposal. . . .

Id., 531 U.S. at 455-56, 121 S.Ct. 993 (emphasis added).

In this case, the district court relied on a series of stipulations that Wiley presented to the court in connection with his motion to dissolve the injunction and stay the

limitation action. Wiley stipulated to the district court's exclusive jurisdiction over Norfolk Dredging's Limitation of Liability action; he waived his right to use any state court judgment that he might obtain to preclude Norfolk Dredging from litigating Limitation of Liability issues in federal court; he agreed to the value of the *Pusher # 10*; and he promised not to enforce any state court judgment exceeding that amount until the federal court considered Norfolk Dredging's limitation claim and, if he raised it again, his motion to increase the fund to include the value of the flotilla. Essentially, Wiley agreed that Norfolk Dredging's liability will be limited to the amount of the limitation fund in whatever amount the district court fixes.

In providing these stipulations, Wiley agreed to the same stipulations that were presented to the district court in *Lewis* except as to the specific value of the limitation fund. Norfolk Dredging contends that the absence of a stipulation as to the value of the limitation fund makes Wiley's stipulations inadequate to protect Norfolk Dredging's Limitation of Liability claim.

Norfolk Dredging has not, however, demonstrated to us how the failure of Wiley to agree to the *amount* of the limitation fund prejudices its Limitation of Liability right. Stipulating that the fund, whatever its amount, is the limit of Norfolk Dredging's liability insulates Norfolk Dredging from overpaying just as would a stipulation to its precise amount. We cannot see how saving for another day the question of Norfolk Dredging's amount of liability prejudiced its general right to limit liability. All the district court did in this case was effectively to postpone, and thereby possibly avoid,

resolving the novel question whether to apply the flotilla doctrine to determine the size of the limitation fund.

Moreover, postponing the determination of the final value of the limitation fund in a Limitation of Liability action is consistent with the broad power of the district court to manage its cases and to reserve the determination of any important, yet potentially irrelevant, issue until later in the proceedings. Even in *Lewis*, the district court had not yet determined whether the shipowner was foreclosed from limiting its liability due to its knowledge of or privity to the incident. And the Rules expressly anticipate that the district court's initial approval of an amount for the limitation fund can be changed later upon the motion of the claimant. *See* Supplemental Admiralty and Maritime Claims Rule F(7) (authorizing the claimant by motion to have the limitation fund increased). In fact, postponing a decision on the final amount of the limitation fund was the precise procedure approved in *Two "R" Drilling Co. v. Rogers*, 943 F.2d 576 (5th Cir.1991).

In *Two "R" Drilling*, the Fifth Circuit approved the district court's decision to dissolve an injunction to allow state proceedings to continue even though the parties could not agree on the values of either of the two vessels in dispute. *Id.* at 578. The claimant stipulated to federal jurisdiction, waived application of *res judicata* principles, and agreed not to enforce any state judgment exceeding the limitation fund, which was initially constituted according to the shipowner's stated value of the two vessels, until the federal court could resolve the value of the ships. The Fifth Circuit, as well as the district court before it, held that these stipulations, even

in the absence of a final determination of the fund's amount, were sufficient to protect the shipowner's right to limit liability.

Because Wiley has agreed that Norfolk Dredging's liability will be limited to the value of the fund, in whatever amount the district court determines, the Limitation of Liability right is preserved. Wiley agreed to the jurisdiction of the federal court to decide the Limitation of Liability claim, and he agreed that whatever judgment he might obtain in state court will not be used to attack the Limitation of Liability claim, either through principles of *res judicata* or by enforcement of the state judgment. Indeed, Wiley has agreed that the district court retain jurisdiction until Wiley's personal injury claim has been determined. Thus, should Wiley's stipulations provide inadequate protection in some unforeseen way, the district court has continuing jurisdiction to correct any deficiencies. *See Lewis*, 531 U.S. at 453-54, 121 S.Ct. 993 ("[O]ut of an 'abundance of caution,' the [district] court stayed the limitation proceedings so that it could act if the state court proceedings jeopardized the vessel owner's rights under the Limitation Act").

The district court acted well within its discretion in staging the proceedings by staying this action and allowing a state court action to proceed, postponing until later the final determination of what the precise amount of the limitation fund should be.

Appendix A

III

Norfolk Dredging also contends that Wiley has waived his right to move for the dissolution of the injunction and for a stay of this action because he has sought affirmative relief in this action by filing a motion to increase the fund and by initiating discovery. Norfolk Dredging urges that we treat Wiley like a defendant whose special appearance for personal jurisdiction is converted to a general appearance upon seeking affirmative relief or like a plaintiff who has waived his right to remand in a removed case.

Norfolk Dredging's analogies are, however, inapt. Wiley has not objected to federal jurisdiction while taking advantage of it. Indeed, he has stipulated to exclusive federal jurisdiction for purposes of deciding the Limitation of Liability issues. Thus, Wiley's motion to increase the fund and his initiation of discovery are consistent with his efforts to advance his position in the federal Limitation of Liability case even as he also seeks to pursue a parallel state proceeding.

To the extent that there is potential for abuse of the federal process, as Norfolk Dredging suggests, by protracting the proceedings or by taking advantage of discovery in the federal proceedings in anticipation of filing a state action, Norfolk Dredging is free to assert those claims in the district court in the appropriate circumstances. We do not suggest, however, that based on the record before us, there is evidence of either undue protraction of the federal action or abuse of discovery.

IV

Finally, Wiley requests that we impose sanctions on Norfolk Dredging for filing a frivolous appeal. We do not, however, find Norfolk Dredging's appeal frivolous and therefore deny his request for attorneys fees and costs.

For the reasons given, the district court's order of February 22, 2005 is

AFFIRMED.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED FEBRUARY 22, 2005

UNITED STATES DISTRICT COURT
E.D. VIRGINIA
NORFOLK DIVISION

No. 2:04CV619

In the Matter of The Complaint of NORFOLK DREDGING COMPANY as Owner of the Pusher # 10, for Exoneration from or Limitation of Liability,

Plaintiff,

v.

John L. WILEY,

Claimant.

Feb. 22, 2005

OPINION AND ORDER

REBECCA BEACH SMITH, District Judge.

This limitation of liability case is before the court on three motions filed by claimant John L. Wiley: a motion to dismiss, a motion to dissolve the injunction issued by this court and to stay the federal proceeding, and a motion to increase the limitation fund. For the reasons stated below,

claimant's motion to dismiss is DENIED, and the motion to dissolve the injunction and stay the proceedings is GRANTED. The court DENIES the motion to increase the limitation fund at this time, as it may become moot; claimant may renew the motion, if appropriate, after he proceeds with his case in state court.

I. Factual and Procedural History

On October 19, 2004, plaintiff Norfolk Dredging Company, owner of the tug PUSHER # 10, filed this action for exoneration from or limitation of liability pursuant to the Limitation of Vessel Owner's Liability Act of 1851, 46 App.U.S.C. §§ 181-189 ("Limitation of Liability Act"). Plaintiff seeks exoneration from or limitation of liability for damages resulting from an accident which took place on November 27, 2003, on the navigable waters of the United States. John L. Wiley (hereinafter "Wiley" or "claimant"), a deckhand, was involved and injured in that accident.

Under the Limitation of Liability Act, a shipowner can limit its liability to the value of its vessel and pending freight, provided that the accident occurred without the privity or knowledge of the owner. *See* Robert Force, *Admiralty and Maritime Law* 133 (2004). The shipowner must file a complaint in federal district court within six months of receipt of written notice of a claim. *See* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 15-5 (4th ed. 2001). As a condition to filing the complaint, the shipowner/plaintiff must deposit with the court a sum of money equal to the value of his interest in the vessel and pending freight, or approved security thereof. *Id.* Upon compliance with these conditions,

the court will issue an injunction to stay all proceedings against the vessel owner with respect to the incident in question. *Id.* Plaintiff in this case has posted security in the amount of the claimed value of the vessel, $80,000, and this court entered an injunction against all other proceedings on October 20, 2004.

On November 23, 2004, claimant answered the complaint and filed several motions: (1) a motion to dismiss plaintiff's complaint, on the ground that the complaint was filed more than six months after plaintiff received notice of claimant's claim against it; (2) a motion to dissolve the injunction and stay the proceeding; and (3) a motion to increase the limitation fund and increase the posted security. Plaintiff responded on December 6, 2004. A hearing was held on February 1, 2005.

II. Analysis

A. Venue

Supplemental Rule of Federal Civil Procedure F(9) dictates the requirements for venue in limitation of liability cases. The Rule states:

> The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has

> not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district, and no suit has been commenced in any district, then the complaint may be filed in any district.

Fed.R.Civ.P. Supp. R. F(9). The PUSHER # 10 has not been attached or arrested, nor has the owner been sued with respect to this claim. Therefore, under Rule F(9), venue is appropriate in the district where the vessel is located; and if it is not within any district, venue lies in any district.

A vessel is "within the district" of a district court if it is in the territorial waters of the United States. *See* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 21-3 n. 19 (4th ed. 2001). The territorial waters of the United States extend to twelve nautical miles off shore. *Id.* at § 2-14. Generally, a vessel is understood not to be within any district if it is lost at sea or in foreign waters. Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 850 n. 47 (2d ed. 1975). For the purpose of establishing venue, the court must consider the location of the vessel at the time the complaint was filed. *In re Norfolk Dredging Co.*, 240 F.Supp.2d 532, 535 (E.D.Va. 2002).

In its complaint, plaintiff states that the PUSHER # 10 was not within the district of any United States district court at the time the complaint was filed. Compl. ¶ 5. Claimant disputes this in his answer, and argues in his rebuttal brief that venue is inappropriate. *See* Claimant's Answer and

Grounds of Defense at ¶ 1; Claimant Wiley's Rebuttal Brief at 3. At the February 1, 2005, hearing, the court ordered plaintiff to file documents with the court showing the location of the PUSHER # 10 at the time the complaint was filed.

On February 4, 2005, plaintiff provided the court with three affidavits stating that the PUSHER # 10 was operating outside of the territorial waters of the United States on October 19, 2004, between 10:40 a.m. and 12:00 p.m.[1] Claimant has not opposed these affidavits with contrary evidence. The complaint was filed on October 19, 2004, at 11:40 a.m. As the PUSHER # 10 was operating outside of the jurisdiction of any district court at the time the complaint was filed, venue is appropriate in any district. Thus, venue is appropriate in this court.

B. Motion to Dismiss

Claimant's motion to dismiss contends that plaintiff's complaint was not timely filed. Under 46 App.U.S.C. § 185, a limitation of liability action must be filed within six months of receipt of "written notice of claim." It is well-settled that a letter sent by a claimant (or claimant's attorney) to a vessel owner may constitute notice of a claim, and such notice may be sufficient to trigger the six month statute of limitations. *See Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co.*, 107 F.2d 373 (4th Cir. 1939); *In re Salty Sons Sports Fishing, Inc.*, 191 F.Supp.2d 631 (D.Md. 2002); *In re Beesley's Point Sea-Doo, Inc.*, 956 F.Supp. 538 (D.N.J.

1. To supplement the affidavits, plaintiff also submitted a chart denoting the location and course of the PUSHER # 10 on October 19, 2004, in the Gulf of Mexico.

1997); *In re Loyd W. Richardson Constr. Co.*, 850 F.Supp. 555 (S.D.Tex. 1993).

Claimant's previous attorney sent a letter to plaintiff on March 8, 2004, advising that his law firm had been retained to represent Wiley "in his cause of action for personal injuries sustained by him on November 27, 2003." *See* Claimant's Mem. of Law in Supp. of Mot. to Dismiss, Ex. 1. The letter then requests that plaintiff provide "any documentation [it has] concerning the incident" to claimant's attorney. *Id.* Plaintiff does not deny that it received this letter,[2] but it denies that the letter constitutes "written notice of claim" under § 185. If the letter does constitute proper notice, plaintiff's claim is time-barred, as the letter was apparently received in March 2004, and this case was filed approximately seven months later, on October 19, 2004.

Although case law on this issue is not extensive, several courts have dealt with the issue of whether a letter to a plaintiff in a limitation of liability action constitutes notice of a claim. The Fourth Circuit has not issued a published opinion addressing this question since 1939. In that case, *Standard Wholesale Phosphate & Acid Works v. Travelers Ins. Co.*, 107 F.2d 373 (4th Cir. 1939), the court held that letters sent from an insurance company to a vessel owner were written notices of claims within the statute, as they indicated that the vessel owner was responsible for the injuries sustained and that claims (for damages) were being made by the injured party.

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2. In fact, the letter is attached to Norfolk Dredging Company's Brief in Opposition to Claimant's Motion to Dismiss as Exhibit A.

Appendix B

Other courts have considered several factors in determining whether or not a particular letter constitutes "notice" to a vessel owner under the statute. These factors include "whether the letter (1) informs the vessel owner of claimant's 'demand of a right or supposed right,' (2) blames the vessel owner for 'any damage or loss,' or (3) calls upon the vessel owner for something due claimant." *Richardson*, 850 F.Supp. at 557 (citations omitted). A writing may constitute sufficient notice of claim even if it is couched only in tentative terms, but in such a case the letter must be read in its entirety to determine whether it is too ambiguous or non-adversarial to constitute notice. *In re Allen N. Spooner & Sons, Inc.*, 253 F.2d 584, 586 (2d Cir. 1958); *id.*

Some courts have placed heavy emphasis on whether the letter gives any indication that the claim may exceed the value of the ship. *See Salty Sons*, 191 F.Supp.2d at 637. In *Salty Sons*, the court held that the written notice *must* indicate a reasonable possibility that the claims would exceed the value of the ship. *Id.* at 636 (citing *Van Le v. Five Fathoms, Inc.*, 792 F.Supp. 372, 374 (D.N.J. 1992)). However, in an unpublished opinion, the Fourth Circuit stated in dictum that "the statute does not impose any such burden," and thus the claimant was not required to state that the claim would exceed the value of the vessel. *Big Deal, Inc. v. Pouchie*, 958 F.2d 367, 1992 WL 51311,*3 n. 4 (4th Cir. 1992) (per curiam).[3]

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3. *Big Deal* is distinguishable from the case at bar. The letter at issue in *Big Deal* stated that "[c]laim is hereby made for payment of lost wages, unearned wages, maintenance and cure, and damages." 958 F.2d 367, 1992 WL 51311 at *1. That statement goes a great deal further toward quantifying the claim than does the letter in this case.

Appendix B

The letter at issue in this case is very similar to one considered in *In re Okeanos Ocean Research Foundation, Inc.*, 704 F.Supp. 412 (S.D.N.Y. 1989). In that case, the court determined that a letter sent to a vessel owner which did not blame the vessel owner for the injuries or describe the incident or injuries in any detail did not constitute notice under § 185. The letter only stated that the law firm had been retained in connection with a cause of action arising out of injuries sustained on the owner's boat on a certain date; the letter also asked the vessel owner to contact his insurance carrier. *Id.* at 416. The court in *Okeanos* distinguished *Spooner* and other cases on the ground that the letters in those cases clearly blamed the vessel owner for the injuries sustained and characterized the nature and extent of the injuries.

Here, as in *Okeanos*, the letter neither blames the plaintiff nor states the nature or extent of the injuries received. While the letter at issue here states that the law firm has been retained "to represent [Wiley] in his cause of action for personal injuries," it merely asks for documentation from plaintiff and does not place or indicate blame for the injuries. Simply put, the letter does not state a belief that plaintiff was at fault in any way or is responsible for Wiley's injuries, nor does it state that Wiley will be suing claimant. Unlike the letter at issue in *Beesley's Point Sea-Doo, Inc.*, 956 F.Supp. at 541, this letter does not recommend that plaintiff contact its insurer, nor does it reference depositions or settlement negotiations, *In re Oceanic Fleet, Inc.*, 807 F.Supp. 1261, 1262 (E.D.La. 1992). Furthermore, it does not quantify the claim in any manner; thus plaintiff could not know whether the claim would exceed the value of the vessel or not. Under the holistic approach adopted by most courts

considering this issue, claimant's letter fails to provide notice under § 185. *See, e.g., Spooner*, 253 F.2d at 586 (holding that "the whole tenor of the letter" suggests that it constitutes a notice of claim); *see also Doxsee Sea Clam Co., Inc. v. Brown*, 13 F.3d 550, 554 (2d Cir. 1994); *Beesley's Point Sea-Doo, Inc.*, 956 F.Supp. at 541.

Judge Learned Hand, concurring in *Spooner*, wrote:

> If all that the owner had to do was to file a petition, it might well be that even the warning of a possible claim would be enough, but he must do more; he must either file security for the full value of his ship, or surrender her to a trustee. It does not seem reasonable to me to require this of him upon penalty of losing his privilege when the claimant's position is equivocal.

Spooner, 253 F.2d at 586-87. Because the statute requires vessel owners to post security at the time of filing a limitation of liability action, courts have traditionally been hesitant to require that such an action be filed in response to a vague letter which fails to specifically threaten suit or give some approximation as to the extent of the owner's liability. It is this same hesitation which leads this court to conclude that the letter sent by claimant's attorney does not constitute "written notice of claim" for purposes of § 185. Therefore, claimant's motion to dismiss is DENIED.

Appendix B

C. Motion to Dissolve the Injunction and Stay the Proceeding

Claimant filed a Motion to Dismiss, and Alternatively, to Dissolve the Injunction and Stay the Proceeding. Claimant contends that if the limitation action is not dismissed, the injunction preventing him from filing suit in state court should be lifted and the limitation action should be stayed pending determination of any state court case.

It is well-settled that, in certain situations, a claimant must be allowed to pursue his action outside of the limitation proceeding if he chooses to do so. Title 28 U.S.C. § 41(3) confers upon federal district courts admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The Supreme Court noted in *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931), that the "savings to suitors" clause of 28 U.S.C. § 41(3) is in direct tension with the Limitation Act. The Court held in *Langnes* that it was in the discretion of the district court whether to dissolve the injunction and permit the state court to proceed, or whether to retain complete jurisdiction. *Langnes*, 282 U.S. at 541, 51 S.Ct. 243. In that case, however, the Court held that it was an abuse of discretion for the district court to retain jurisdiction of the case, because otherwise the claimant's right to a common-law remedy (i.e., right to a jury trial) was destroyed; however, if the vessel owner's right to limitation was called into question in state court, the district court could resume jurisdiction. *Id.* Following *Langnes*, the Court held in *Ex Parte Green*, 286 U.S. 437, 440, 52 S.Ct. 602, 76 L.Ed. 1212 (1932), that although it

was proper for a district court to dissolve an injunction against state court proceedings in certain circumstances, the district court is authorized to resume jurisdiction and dispose of the whole case "if the value of the vessel be not accepted as the limit of the owner's liability."

Since *Langnes* and *Green*, courts have considered the circumstances under which it is appropriate to dissolve an injunction and allow a claimant to proceed in state court. In most cases, this issue boils down to whether stipulations filed by the claimant are sufficient.[4] In *In re Two "R" Drilling Co., Inc.*, 943 F.2d 576 (5th Cir. 1991), the Fifth Circuit affirmed the dissolving of an injunction where claimant stipulated to the following: (1) that the vessel owner was entitled to litigate all issues relating to limitation of liability in district court; (2) that any claim of res judicata relevant to the issue of limitation would be waived; and (3) that if the amount of recovery awarded in the state court action exceeded the claimed worth of the vessel, claimant would not seek to enforce that judgment (to the extent it exceeded the claimed worth of the vessel) pending the adjudication of the limitation of liability issue in federal court. Notably, claimant did not stipulate or agree to the amount stated by the vessel owner as the value of the vessel. The court held that under *Green*, "[w]here the claimant concedes the admiralty court's exclusive jurisdiction to determine all issues relating to the limitation of liability, the district court should lift any stay

4. This reasoning applies only to single-claimant situations. Where the party seeking limitation of liability may face multiple claims, stipulations by one or more potential claimants may not be sufficient to protect the right to have the limitation issue be decided in federal court.

against the state proceeding." *Two "R" Drilling*, 943 F.2d at 578. The Fifth Circuit has since reaffirmed its holding in *Two "R" Drilling* in *In re Tetra Applied Technologies*, 362 F.3d 338 (5th Cir. 2004).

Similarly, in *In re McAllister Towing of Virginia, Inc.*, 999 F.Supp. 797 (E.D.Va. 1998), the court considered claimant's stipulations to be sufficient to allow a state court action to proceed. The claimant did not concede the value of the vessel, but did stipulate to the federal district court's right to determine the limitation of liability. The court found that the vessel owner's rights to limited liability under the statute were adequately protected with the stipulations made by claimant. *Id.* at 802. Going one step further, the Sixth Circuit held in *Muer v. Karbel*, 146 F.3d 410 (6th Cir. 1998), that a district court had "overstepped its bounds by reaching issues ancillary to the [limitation of liability] action when the claimant-appellant stipulated to the district court's jurisdiction" over that action. *Id.* at 419.

Claimant has filed five stipulations with the court.[5] Claimant makes the following stipulations: (1) he concedes that this court has exclusive jurisdiction to decide all limitation of liability issues; (2) he does not dispute the alleged value of the PUSHER # 10, but contends that the Limitation Fund should include all vessels contractually

5. The first four stipulations were submitted in a document entitled Stipulation of Claimant John L. Wiley, filed along with claimant's Motion to Dismiss, and Alternatively, to Dissolve the Injunction and Stay this Proceeding. The fifth stipulation is in claimant's Rebuttal Brief.

engaged in a common enterprise under a single command;[6] (3) this is a single claim made by a single claimant; (4) no res judicata arguments will be made based on any jury trial decision or judgment in state or federal court; and (5) claimant will not seek to enforce any judgment received from a jury in excess of the Limitation Fund until the vessel owner's right to limitation has been determined in admiralty. Stipulation of Claimant John L. Wiley; Claimant Wiley's Rebuttal Brief at 1. These stipulations are basically equivalent to the ones made by the claimants in *Two "R" Drilling*, *McAllister* and *Muer.* As the claimants did in those cases, Wiley stipulates that if he is awarded a judgment in excess of the limitation fund, he will not seek to enforce that judgment until the limitation of liability issue has been settled by this court. Under these circumstances, claimant should be allowed to bring his claim in state court if he so chooses, where he has a right to a jury trial. Therefore, this court GRANTS claimant's motion to dissolve the injunction and stay the proceedings in this court.[7]

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6. Claimant filed a separate motion on this issue, discussed *infra* at § II.D.

7. There are several circumstances under which this action may be resumed in this court. If the plaintiff challenges the vessel owner's right to limit liability during the state court proceedings, this court may resume jurisdiction over the case in order to protect "the paramount federal right." *Muer*, 146 F.3d at 418. If no such challenge is made and the state court renders a judgment in favor of the vessel owner, or in favor of the claimant in an amount less than the limitation fund, the limitation proceeding will be dismissed as moot. However, if the claimant wins a judgment in excess of the limitation fund, the federal action will proceed in order to determine those issues relevant to the limitation of liability. *Id.*

Appendix B

D. Motion to Increase the Limitation Fund

Claimant argues that the limitation fund should be increased, pursuant to the "flotilla doctrine," to reflect the combined values of all vessels taking part in the operation during which claimant was injured. *See Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 47 S.Ct. 368, 71 L.Ed. 663 (1927); *Liverpool, Brazil, & River Plate Steam Navigation Co. v. Brooklyn Eastern Dist. Terminal*, 251 U.S. 48, 40 S.Ct. 66, 64 L.Ed. 130 (1919); *Standard Dredging Co. v. Kristiansen*, 67 F.2d 548, 551 (2d Cir. 1933) (cases establishing the "flotilla doctrine"). Because this issue may be rendered moot if claimant's judgment in state court does not exceed the limitation fund as it now stands, claimant agreed at the hearing to set this issue aside until such time as it becomes relevant. Therefore, the court DENIES the motion to increase the limitation fund, but will permit claimant to renew it in the limitation action, if necessary.

III. Conclusion

For the aforementioned reasons, the court DENIES claimant's motions to dismiss and to increase the limitation fund. The court GRANTS claimant's motion to dissolve the injunction and stay the proceedings. Given the stay of this action, pending motions regarding discovery deadlines and issues are now MOOT. The Clerk is DIRECTED to send a copy of this Opinion and Order to counsel for both parties.

IT IS SO ORDERED.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED MARCH 31, 2006

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-1331
CA-04-619-2

NORFOLK DREDGING COMPANY

Plaintiff – Appellant

v.

JOHN L. WILEY

Claimant – Appellee

On Petition for Rehearing and Rehearing En Banc

FILED
March 31, 2006

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

Appendix C

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Niemeyer, Judge Luttig, and Judge Traxler.

For the Court,

/s/ Patricia S. Connor
CLERK

APPENDIX D — RELEVANT RULE

Rule F. Limitation of Liability

(1) Time for Filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended . . . .

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner s liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state . . . the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. . . .

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner s property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against

the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

* * *

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

* * *

(7) Insufficiency of Fund or Security. Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

Appendix D

(8) Objections to Claims: Distribution of Fund. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

* * * *